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No. 533

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

UNITED STATES OF AMERICA,
Petitioner,

v.

STANLEY S. NEUSTADT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Solicitor General advances four reasons for granting a writ of certiorari: (1) There is an alleged conflict with certain decisions of other Courts of Appeals; (2) The court below misinterpreted and so failed to apply the "misrepresentation" exception in the Tort Claims Act, 28 U.S.C. 2680(h); (3) The court below incorrectly held that there was an actionable duty of care owed by the Federal Housing Commissioner to the respondents; and (4) The possible liability of the government, under the decision below, while not ascertainable, could conceivably

be large. We shall discuss the first two of these contentions together since the alleged conflict rests in part upon the Solicitor General's incorrect interpretation of 28 U.S.C. 2680(h).

I. There Is No Conflict Between the Decision Below and Those of Other Courts of Appeals

In the twenty-two years since the Tort Claims Act was enacted there have been about half a dozen reported cases in which recovery was sought for an injury that could arguably be said to have been caused by reliance upon a misrepresentation by an employee of the United States, and the decision in each case was based upon a reasonably unique set of facts. For this reason, as the court below pointed out, these cases afford "no clear line . . . which serves as a guide to the solution of the present controversy," and far from being in conflict with the instant decision, they are readily reconcilable with it.

The Tort Claims Act, of course, permits recovery for injuries caused by the negligence of employees of the United States. As the court below noted (Pet. pp. 31-32), there are numerous and familiar instances in which negligent conduct, in a context that includes some form of inaccurate communication, results in injury for which recovery is allowed in an action for negligence rather than for misrepresentation. The Solicitor General appears to argue, however, that the "misrepresentation" exception to the Tort Claims Act must be interpreted to exclude recovery in every case where some communication can be found. It is on this basis that he contends that the decision below is in conflict with such cases as *Hall* v. *United States*, 274 F.2d 69 (C.A. 10) and *National Mfg. Co.* v. *United States*, 210 F.2d 263 (C.A. 8), *cert. den.* 347 U.S. 967, since in those cases incorrect representations had been made to

the plaintiffs and recovery was denied, while in this case recovery has been allowed.

There is no apparent basis for this sweeping interpretation of Section 2680(h), and it is hard to believe that the Congress intended to exclude recovery under the Tort Claims Act in the many situations in which negligence rather than misrepresentation has always been considered an appropriate form of action. No such intention can be found in the statutory language and even less can it be found in the legislative history.[1] The sounder analysis, followed by the court below, is to determine whether the gist of the offense is the negligent conduct or the misrepresentation. If it is the negligent conduct, and the communication is incidental, then recovery should be allowed. If, on the other hand, the misrepresentation is the fundamental element in the chain of events leading to the injury, then perhaps the exception applies. Of necessity, therefore, each case turns upon its particular facts.

We agree, in short, "that Congress intended the word [misrepresentation in 28 U.S.C. 2680(h)] to have the scope it carries in normal legal usage." (Pet., p. 13). The court below, applying this principle, properly found respondents' action one for negligence, which made the "misrepresentation" exception inapplicable.

The issue of whether a plaintiff's claim is based fundamentally upon negligent conduct or upon misrepresentation is frequently an interesting and difficult one and it affords a further proof of the continued vitality of Maitland's famous

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[1] If anything, the legislative history indicates an intention to provide an exception for only willful and not for negligent misrepresentation. See H. Rep. 2245, 77th Cong., 2d Sess. at p. 10 ("these exceptions cover . . . deliberate torts such as assault and battery and others."); S. Rep. 1196, 77th Cong., 2d Sess., p. 7; H. Rep. 1287, 79th Cong., 1st Sess., p. 6; Hearings Before the House Judiciary Committee, 76th Cong., 2d Sess., 28, 33, 34, 45.

dictum about the forms of action. But this question is one that hardly deserves the attention of this Court. In this case, moreover, the question was correctly decided by the court below. As we show later, there was an antecedent duty of care owed by the Federal Housing Commissioner to the respondents that was not adequately performed long before there was any communication to the respondents at all. No such showing was made in the cases relied upon by the government to establish a conflict.[2]

The Solicitor General is, moreover, inaccurate when he says that "absent the misrepresentation of the property value, the respondents would have gone unharmed." (Pet. p. 10). Their injury did not result from their reliance upon the appraisal report but from the fact that the mortgage insurance was available to them. By the terms of their purchase contract they were obligated to accept a deed to the property only if FHA insurance was issued. They had so conditioned their purchase contract because

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[2] As the Solicitor General says, in *Hall* v. *United States*, *supra*, the Court of Appeals for the 10th Circuit did not deal with the question whether the duty there was owed to the public at large rather than the owner of the cattle. It is not as obvious to us, however, as it is to the Solicitor General, that a statute that authorizes the imposition of severe restrictions upon the transportation of diseased cattle in interstate commerce was adopted primarily in the interest of the cattle owner rather than as a means of preventing the spread of the disease to other herds. See 9 C.F.R. Part 76; Cf. *Anglo-American and Overseas Corp.* v. *United States*, 141 F. Supp. 635 (S.D.N.Y.), aff'd. 242 F. 2d 236 (C.A. 2).

The government also argues (Pet. fn. 12) that under the opinion below the existence of a duty of care precludes resort to the "misrepresentation" defense and so effectively reads this exception out of the statute. This quite mistakes the holding of the Court of Appeals. The "misrepresentation" exception would, under that Court's opinion, remain the only basis for denying liability which would otherwise be imposed where the duty of care arises in connection with or as a result of the making of the representation. It is only where there is a pre-existing duty of care related to the activity of the government employee that the exception is inapplicable and this is because the cause of action is based fundamentally upon the wrongful conduct.

of their knowledge that insurance would not be available unless a careful inspection of the premises by an FHA appraiser failed to reveal the existence of any serious structural defect (R. 39-40). Thus it was the admittedly negligent inspection that was the direct cause of their injury. If, for some reason, the government had failed to carry out its statutory obligation to furnish respondents with the statement of appraised value, there would have been no break in the chain of causation between the wrongful conduct and the injury. The communication, upon which the Solicitor General bases his contention that respondents' cause of action was for misrepresentation and not for negligence, was in fact a trivial and non-essential element in the total activity that gave rise to the government's liability.

II. The Decision of the Court of Appeals That the FHA Owed the Respondents an Actionable Duty of Due Care Does Not Warrant Review by This Court

Once it is recognized that the respondents' action sounds in negligence, the question of whether the conceded negligence of the United States is actionable involves only the routine application of well-settled principles of tort law. Whether there is a duty to carry out a particular activity only with due care, how the class of persons to whom that duty is owed is to be determined, whether injury is reasonably foreseeable if the activity in question is negligently carried out—these are questions that are answered daily by our common-law courts. Cf., for example, the two landmark opinions of Judge Cardozo in *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275, and *Ultramares Corporation* v. *Touche*, 255 N.Y. 170, 174 N.E. 441. These questions were answered in respondents' favor by the court below and this Court does not, under its rules, undertake to re-

view decisions of this nature on the basis of an assertion that these issues were incorrectly decided.

In point of fact the decision of the court below was eminently sound. The Congress, in connection with the adoption of Section 226 of the National Housing Act,[3] made it abundantly plain that the functions of the Federal Housing Administration, under its mortgage insurance programs, were to be conducted not only for the government's own benefit but also for the benefit of the prospective home buyer. The relevant legislative history is discussed in the opinion of the court below. (Pet. p. 29).

The Solicitor General suggests that when the House Committee on Banking and Currency stated that "it is the intent of Congress that the HHFA and its constituent agencies in their administration of the programs which they are authorized to carry out shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser and in so doing to protect his interest to the extent feasible,"[4] it was referring only to the Title I and not to the Title II programs of the FHA. There is not a word in the report itself, however, that indicates that this is the case. On the contrary the report as a whole suggests the contrary—that this language was meant to apply to all of the FHA programs.[5] Furthermore, the government does not suggest, as it could not, that the conference report referred to by the court below was not in terms directed to the Title II mortgage insurance program. The relevant portions of this conference report are reprinted in Appendix A to this brief. They demonstrate unambiguously the understanding of the

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[3] It is this section that requires the statement of appraised value to be furnished the buyer of a home financed through an FHA insured mortgage.

[4] S. Rep. 1472, 83d Cong., 2d Sess., 5.

[5] *Id.*, pp. 19, 69.

Congress that the inspection program of the FHA was designed in principal part as a protection for the individual home buyer.[6]

The Solicitor General argues that because the conference report recognized that "there is no legal relationship between the FHA and the individual mortgagor," it cannot aid in the resolution of the issue of whether there was an actionable duty of care running from the FHA to the mortgagor. But there is, of course, no legal relationship (until the accident occurs) between a pedestrian and the driver of the mail truck who runs him down, or, to take another example, between a property owner and the employees of the Forest Service who negligently fail to control a forest fire.[7] Just as the public weigher in *Glanzer* v. *Shepard, supra,* was held liable because he knew that his report was prepared for the benefit of the plaintiff, so here the Housing Commissioner is liable because he knew that his inspection was carried out pursuant to a statute designed specifically to protect the individual home buyer.

Finally, the Solicitor General mistakes, in our view, the magnitude of the possible liability of the government that might result from a decision in this case. His concern

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[6] The Solicitor General advances the contention (Pet. fn. 10), not strongly pressed below, that there would be no liability here "if a private appraiser would have owed no similar duty under Virginia law," and therefore that the imposition of "a unique duty upon the United States" by the National Housing Act is irrelevant. But 28 U.S.C. 1346(b) and 2674 make the United States liable to the same extent as a private person "under like circumstances . . . " The real question, therefore, is whether a private appraiser in Virginia, performing his duties under a statute intended specifically to protect the individual home buyer would be held liable. Neither party below could find any Virginia cases bearing directly on this point and so the Court of Appeals was forced to rely upon well settled principles of the common law of torts. Cf. *Valz* v. *Goodykoontz,* 112 Va. 853, 72 S.E. 730.

[7] *Rayonier* v. *United States,* 352 U.S. 315.

might have been justified if the court below had found that the FHA was a guarantor of the structural soundness of houses financed by its insurance mortgages. But since recovery may be had only where the negligence of the FHA can be established, and since this can be done, except in the extraordinary case, only with the greatest difficulty, it is highly unlikely that this case will be followed by many others like it. The very fact that scores of billions of dollars of mortgage insurance have been issued since 1934 and that only now has the first case of this kind arisen seems overwhelmingly persuasive of the fact that the Solicitor General's fears are without foundation.

Conclusion

For the reasons given the petition for certiorari should be denied.

Respectfully submitted,

LAWRENCE J. LATTO,
Attorney for Respondents.

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APPENDIX A

Excerpt From Conference Report on Housing Act of 1954, H. Rep. No. 2271, 83d Cong., 2d Sess., pp. 66-67.

"Historically, the fundamental soundness of the whole concept of the FHA home mortgage insurance system has rested on the integrity of its appraisal system as a measurement of the long-term economic value of a given residential property to be underwritten with an insured mortgage loan. Basically, the F.H.A's appraisal system, as well as many of its other prinicipal procedures (such as its property location standards, its minimum construction requirements, and its inspection system), are obviously essential to the proper underwriting of mortgage loan risks, and therefore operate primarily for the protection of the Government and its insurance funds. Nevertheless, the Congress has consistently recognized—and intended—that, notwithstanding the fact that, technically there is no legal relationship between the FHA and the individual mortgagor, these FHA procedures also operate for the benefit and protection of the individual home buyer. However, there has apparently been a strong tendency on the part of the FHA to view these procedures as operating *exclusively* for the protection of the Government and its insurance funds. The committee of conference does not believe such a view to be consistent with the intent of the Congress in respect of the basic legislation relating to the FHA in the past, and, as to the future, desire to make it abundantly clear that such is not the case.

"In this connection, the committe of conference calls attention to two specific provisions included in the conference substitute which clearly indicate the intent of the Congress that the protections of the FHA system shall also inure to the benefit of the individual home buyers. • • • The other is the provision which requires that the seller or builder or such other person as may be designated by the FHA Commissioner shall agree to deliver, prior to the execution of a contract for the sale of the property,

to the purchaser a written statement setting forth the amount of the FHA's appraised value of the property.

"The committee of conference desires to point out the importance it attaches to the latter provision, especially at this particular time, in protecting the individual home buyers. Generally speaking, an appraisal of the long-term economic value of a particular residential property represents the informed judgment of a professional technician as to the dollar amount which a well-informed purchaser, acting without duress or compulsion, would be warranted in paying for such property for long-term use or investment. . . ."

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